Supreme Court, U.S.
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JUL 24 1986
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CLERK

No. 86-108

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GARY HILTON, Superintendent,
New Jersey State Prison, Trenton, New Jersey
and W. CARY EDWARDS, Attorney General
of New Jersey,

Petitioners,

-vs.-

DANA BRAUNSKILL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Division of Criminal Justice

Of Counsel &
On the Petition

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Are federal courts absolutely barred from considering issues such as a habeas corpus petitioner's dangerousness to the community and the likelihood that the order granting release will be reversed on appeal in deciding whether to stay release on habeas corpus pending appeal?

PARTIES BELOW

All parties below are parties to this petition.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. ____

GARY HILTON, Superintendent,
New Jersey State Prison, Trenton, New Jersey
and W. CARY EDWARDS, Attorney General
of New Jersey,

Petitioners,

-vs.-

DANA BRAUNSKILL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners, Gary Hilton, Superintendent, New Jersey State Prison, Trenton, New Jersey and W. Cary Edwards, Attorney General of New Jersey, respectfully pray that a writ of *certiorari* issue to review the order of the United States Court of Appeals for the Third Circuit entered in the above-entitled proceeding on May 27, 1986.

OPINIONS BELOW

The order of the United States District Court for the District of New Jersey, issued without a written opinion, is reproduced in Appendix E.

The district court's stated reasons for denying the order are reproduced in Appendix F.

The Order of the United States Court of Appeals which has not been published, and was issued without written opinion is reproduced at Appendix G.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. sec. 2254, respondent petitioned for a writ of habeas corpus in the United States District Court for the District of New Jersey.

Petitioners filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit under 28 U.S.C. sec. 2253. Petitioners' motion for a stay of respondent's release on federal habeas corpus was denied by the Third Circuit Court of Appeals under *Fed. R. App. P.* 8(a) and 23(b), (c) and (d). No petition for rehearing was sought.

The jurisdiction of this Court to review the order of the Third Circuit is invoked under 28 U.S.C. sec. 1254(a).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him;

to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

RULES INVOLVED

Rule 23. Custody of Prisoners in Habeas Corpus Proceedings

(a) Transfer of Custody Pending Review. Pending review of a decision in a habeas corpus proceeding commenced before a court, justice or judge of the United States for the release of a prisoner, a person having custody of the prisoner shall not transfer custody to another unless such transfer is directed in accordance with the provisions of this rule. Upon application of a custodian showing a need therefor, the court, justice or judge rendering the decision may make an order authorizing transfer and providing for the substitution of the successor custodian as a party.

(b) Detention or Release of Prisoner Pending Review of Decision Failing to Release. Pending review of a decision failing or refusing to release a prisoner in such a proceeding, the prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may be enlarged upon his recognizance, with or without surety, as may appear fitting to the court or justice or judge rendering the decision, or to the court of appeals or to the Supreme Court, or to a judge or justice of either court.

(c) Release of Prisoner Pending Review of Decision Ordering Release. Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be enlarged upon his recognizance, with or without surety, unless the court or justice or judge rendering the decision, or the court of appeals or the Supreme Court, or a judge or justice of either court shall otherwise order.

(d) Modification of Initial Order Respecting Custody. An initial order respecting the custody or enlargement of the prisoner and any recognizance or surety taken, shall govern review in the court of appeals and in the Supreme Court unless for special reasons shown to the court of appeals or to the Supreme Court, or to a judge or justice of either court, the order shall be modified, or an independent order respecting custody, enlargement or surety shall be made.

STATEMENT OF THE CASE

Respondent was indicted on July 29, 1980, on charges of aggravated sexual assault in violation of N.J. Stat. Ann. 2C:39-5(d) (West 1940 and Supp. 1983), and the unlawful possession of a knife in violation of N.J. Stat. Ann. 2C:14-2 (West 1940 and Supp. 1983). He was tried before the New Jersey Superior Court, Law Division on January 26 through January 30, 1981 and found guilty on both charges. On March 26, 1981, he was sentenced to an aggregate term of eight years in the New Jersey State Prison with a four year parole ineligibility term. His convictions were affirmed by the New Jersey Superior

Court, Appellate Division on December 14, 1982. His petition for certification was denied by the New Jersey Supreme Court on March 1, 1983.

Respondent filed a petition for a writ of habeas corpus in the United States District Court for the District of New Jersey on April 26, 1985. On February 27, 1986, the Honorable Harold A. Ackerman, U.S.D.J., ordered that a writ of habeas corpus should be issued 30 days from that date. (App. A). The basis of this writ was Judge Ackerman's ruling that the state courts had violated respondent's sixth amendment right to call witnesses in his defense by enforcing *New Jersey Court Rule* 3:11-1, which requires that defendants, upon request, inform the State of the identity of any alibi witnesses which they intend to present. The Court further ruled that failure to allow the alibi witness to testify did not constitute harmless error.

Petitioners filed a Notice of Appeal from this order on March 20, 1986. (App. B.) On March 26, 1986, petitioners moved for a stay of respondent's release on habeas corpus before the district court. Judge Ackerman denied this stay on the basis of the United States Court of Appeals for the Third Circuit decision in *Carter v. Rafferty*, 781 F.2d 993 (3rd Cir. 1986). The district court noted that under the *Carter* opinion it could not consider either respondent's dangerousness or the likelihood that the order granting release will be reversed on appeal in deciding whether to stay issuance of a writ of habeas corpus pending appeal. (Appendix D at 3-7 to 4-25; 9-6 to 25; App. E).

On May 16, 1986, petitioners moved before the United States Court of Appeals for the Third Circuit for a stay of the district court writ which ordered

that respondent be released on May 20, 1986. (App. F). This motion was denied on May 27, 1986. (App. 6).

REASONS FOR GRANTING THE WRIT

In refusing to stay respondent's release on federal habeas corpus pending appeal by petitioners, the lower federal courts declined to even consider petitioners' chances of success on appeal or respondent's dangerousness to the community at large. These refusals were based on the very recent decision of the United States Court of Appeals for the Third Circuit in *Carter v. Rafferty*, 781 F.2d 993 (3rd. Cir. 1986). Petitioners assert that the standards set forth in that opinion are novel, in conflict with the opinions of other circuits, at odds with the customary practice and interpretation of controlling statutes, impractical and dangerous.

The starting point of the *Carter* opinion is the fact that a successful habeas corpus litigant is presumptively entitled to immediate release. 781 F.2d 994. Petitioners, of course, would not contest this much of the opinion. Petitioners also agree with that portion of the *Carter* opinion which states that in order to gain release a successful habeas corpus petitioner must assure the court of his presence at future federal court proceedings. *Id.* at 995. The *Carter* court, noting that it had little guidance save for the wording of *Fed. R. App. P.* 23, went on to rule, however, that the federal courts are prohibited from consideration of other factors in determining whether or not to immediately release a federal habeas corpus petitioner. In many cases, such as the one which is the subject of this petition, this crabbed interpretation

of federal statutes unnecessarily places the community at risk. The rule in question absolutely does not mandate such a result.

Petitioners do not seek relief in this court merely because we believe that the lower courts have erred in this particular case. Rather, we believe that a writ of *certiorari* is warranted because the lower courts, relying on the recent *Carter* decision, have decided a substantial federal question not previously considered by this Court in such a manner as to create a conflict between the circuits. Indeed the circuit court in *Carter* specifically stated that it had "no authoritative case law" upon which to rely (Id. at 995) and noted the conflicting opinions. (Id. at 997, n.5).

It cannot be gainsaid that the effects of this ruling are great. It is for this reason, coupled with the fact that *Carter* was an opinion of one panel of the Third Circuit, that petitioners in this case sought *en banc* review of the district court opinion which relied exclusively on *Carter*. The hazards involved in releasing a habeas corpus litigant from state custody pending appeal without any consideration whatsoever of the danger which that person may pose to the community or the chances that the order granting the writ may be reversed on appeal are obvious. *Fed. R. App. P.* 23 does not require such a risk.

It should be noted that the *Carter* court foresaw the possibility that its decision could pose a threat to the community. It ruled, however, that only state "criminal or civil" procedures could be used to alleviate this danger. *Id.* at 996. The *Carter* solution simply does not work and, as noted earlier, is not federally mandated. It will rarely be possible to have a convicted criminal civilly committed solely on the

basis of the fact that he has committed a crime or a number of crimes, even if crimes such as murder or rape are involved.[1] Moreover, state criminal confinement is no remedy. Such confinement is normally conditioned on a decision to recharge and reprosecute. These decisions are often dependent on the outcome of the federal appeal.[2] Thus, the circuit court's purported solution is little more than a restatement of the problem.

The *Carter* opinion, which the district court was required to follow, and which the Third Circuit refused to reconsider, is at variance with long-standing practice in the District of New Jersey, is not mandated by 28 U.S.C. sec. 2254 and is not in consonance with *Fed. R. of App. P.* 23. *Rule* 23 states in applicable part:

> **(b) Detention or Release of Prisoner Pending Review of Decision Failing to Release.** Pending review of a decision failing or refusing to release a prisoner in such a proceeding, the prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may be en-

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[1] Respondent in this case was convicted of aggravated sexual assault under *N.J.S.A.* 2C:14-2, the equivalent of common law rape with a dangerous weapon.

[2] This is particularly true in situations in which the writ is granted on the basis of the introduction of evidence which is constitutionally infirm, *e.g.*, improper identification procedures, *Miranda*-type violations, fourth amendment violations in which the State did not provide an opportunity for a full and fair hearing in State court, etc. Indeed, these tend to be the very areas in which the district court's opinions may be the least certain and the chances of success on appeal the greatest.

larged upon his recognizance, with or without surety, as may appear fitting to the court or justice or judge rendering the decision, or to the court of appeals or to the Supreme Court, or to a judge or justice of either court.

(c) Release of Prisoner Pending Review of Decision Ordering Release. Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be enlarged upon his recognizance, with or without surety, unless the court or justice or judge rendering the decision, or the court of appeals or the Supreme Court, or a judge or justice or either court shall otherwise order.

(d) Modification of Initial Order Respecting Custody. An initial order respecting the custody or enlargement of the prisoner and any recognizance or surety taken, shall govern review in the court of appeals and in the Supreme Court unless for special reasons shown to the court of appeals or to the Supreme Court, or to a judge or justice of either court, the order shall be modified, or an independent order respecting custody, enlargement or surety shall be made.

Sections (b) and (c) of *Rule* 23 each create presumptions which are dependent upon the outcome of the habeas corpus proceeding. Section (b) creates a presumption that if the writ is denied the prisoner will remain in the same position concerning release as he was prior to the decision on his petition. That is, at the discretion of the court he will be subject to continued incarceration unless the court feels that enlargement is appropriate under the circumstances.

Section (c) on the other hand creates a presumption that if a prisoner's conviction is found to have been obtained unconstitutionally or illegally, the prisoner will be enlarged pending review of the decision *unless* a federal court, judge or justice orders otherwise. Thus, it is presumed that a habeas petitioner who has prevailed will be released and that a non-victorious petitioner will remain incarcerated. See *Walberg v. Israel*, 776 F.2d 134, 135-136 (7th Cir. 1985). Nevertheless, at the discretion of the court, these sections permit the enlargement of a non-victorious petitioner and the continued incarceration of a victorious litigant. *Id.* at 136.

Sections (b) and (c) do not provide guidance as to what factors a court may consider in determining whether the prescriptions contained in these sections have been overcome. Since section (b) refers to enlargement, however, it would seem that the normal rules relating to enlargement pending habeas corpus would apply. Thus, a prisoner's chances of success on appeal would be an appropriate factor to consider under section (c). See *Iuteri v. Nardoza*, 662 F.2d 159 (2nd Cir. 1981). Likewise, factors such as the government's chances of success on appeal and the dangerousness of the prisoner should be considerations under section (c).

Section (d) of *Fed. R. App. P.* 23 buttresses this interpretation of sections (b) and (c). Section (d) specifies that the original order entered under sections (b) and (c) shall govern review unless special reasons for modification of the order are shown to either the court of appeals or the Supreme Court. Again, there is no explanation of what "special reasons" may be considered by the reviewing court. However, common

sense would indicate that the reviewing court's analysis of the chances that the lower court order will be reversed on appeal and of the dangerousness of the prisoner would be among these considerations.[3]

The *Carter* court's ruling (which was followed by the district court and the circuit court in this case)[4] that the prisoner's continued ability to respond to federal process or issues which relate to some other federal interest are the sole criteria which may be considered, is in conflict with the decisions of two other circuits. In *Walberg v. Israel, supra*, 776 F.2d at 136, the Seventh Circuit held that the likelihood of reconviction was a factor which could be considered in determining whether a prevailing habeas corpus litigant could be released. Moreover, in *Lewis v. Henderson*, 356 F.2d 105, 106 (6th Cir. 1966), the Court of Appeals for the Sixth Circuit considered the fact that the petitioner faced retrial on an additional charge of attempted murder as a "special reason" for denying release even prior to the enactment of *Rule*

[3] It is noted that *Fed. R. App. P.* 8(a) provides that a district court or court of appeals may stay a district court order pending appeal upon a showing of: (1) likelihood of success on appeal; (2) irreparable injury if the stay is not granted and, where relevant, (3) absence of substantial harm to other interested persons, and (4) absence of harm to the public intent. See *Hill v. Prose*, 579 *F.Supp.* 1080, 1090 (M.D. Tenn. 1983). Thus, even if factors such as success on appeal and the dangerousness of the prisoner could not be considered under *Rule* 23, they certainly could be considered pursuant to a motion to stay release under *Rule* 8.

[4] The Circuit Court simply entered an order denying the motion for a stay of respondent's release; however, since the motion addressed only issues raised in the *Carter* opinion and requested *en banc* consideration of those issues it is apparent that the denial was based on the dictates of *Carter*.

23(d). It should also be noted that the United States District Courts for the District of Delaware (a state within the Third Circuit) and the Southern District of Texas specifically have found dangerousness to be a proper consideration in determining whether to release a successful habeas corpus petitioner. *United States ex rel Taylor v. Redman*, 500 F.Supp. 453, 459 (D. Del. 1980); *Sellars v. Estelle*, 450 F.Supp. 1262, 1265 (S.D. Tex. 1978). *Cf. Hill v. Rose*, 579 F.Supp. 1080 (M.D. Tenn. 1983); *Eagle v. Davis*, 520 F.Supp. 297 (E.D. Tenn. 1980), aff'd 633 F.2d 1070 (6th Cir. 1981). These courts have found that bail-type considerations are appropriately weighed when considering release on appeal following a successful petition for release on habeas corpus.

The Third Circuit noted that its opinion in *Carter* conflicted with the prevailing authority. 781 F.2d at 997 n.5. It diverged from the opinions of the other circuits for two reasons. First, these opinions referred to the term "bail", and the *Carter* court found that "the term 'bail' in the federal habeas corpus context is a misnomer." *Id.* Secondly, the Third Circuit found that it had no explicit authority to consider the factors considered by the other circuits due to the fact that it was ". . . provided not with a detailed statutory scheme concerning the disposition of prisoners fully subject to federal authority, but rather a sparsely worded rule . . . ." *Id.* Petitioners suggest that the rule in question entrusts the federal courts with the discretion to consider all factors which have an impact on the decision to immediately release a state prisoner. Nevertheless, in this case the district court has relied on, and the Third Circuit has refused *en banc* reconsideration of, a recent opinion in which the court

itself noted it had created a conflict among the circuits, and which was based solely on its reading of a "sparsely worded rule" which has not been interpreted by this Court. In so doing it has imposed an unduly restrictive interpretation on the rule in question.

Petitioners assert that the Third Circuit's interpretation fails to pay heed to the clear intent of the rule in question and creates an unnecessary and intolerable danger to the community. It is simply not wise or necessary to require federal courts to blindly order the release of state prisoners in situations in which the prisoner is shown to be a danger to the community and the chances of reversal on appeal are great. Based upon these arguments and the facts that there is a conflict between the circuits and that this is an important issue which has not previously been decided by this court, petitioners request that this Court grant a writ of *certiorari* to review the decision of the United States Court of Appeals for the Third Circuit.

CONCLUSION

Based upon the foregoing reasons this petition for *certiorari* should be granted. The lower federal courts should be permitted to consider factors such as the habeas corpus petitioner's dangerousness to the community and the chances that the order granting release will be reversed on appeal in deciding whether to stay release from state custody pending appeal.

Respectfully submitted,

W. CARY EDWARDS
Attorney General of New Jersey
Attorney for Petitioners

BY: /s/ ALLAN J. NODES
ALLAN J. NODES
Deputy Attorney General
Attorney of Record

ALLAN J. NODES
Deputy Attorney General
Division of Criminal Justice
Appellate Section

Of Counsel and on the Brief

DATED: July 24, 1986

APPENDIX

TABLE OF APPENDIX

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APPENDIX C	NOTICE OF MOTION FOR STAY OF RELEASE AN *HABEAS CORPUS*, dated March 21, 1986.
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APPENDIX F	NOTICE OF MOTION TO UNITED STATES COURT OF APPEAL FOR THE THIRD CIRCUIT FOR STAY OF DISTRICT COURT WRIT ORDERING RELEASE, dated May 16, 1986.
APPENDIX G	ORDER OF UNITED STATES COURT OF APPEALS, dated May 27, 1986.

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 85-2008

DANA BRAUNSKILL,

Petitioner,

v.

GARY HILTON, Superintendent, New Jersey State Prison, Trenton, New Jersey and IRWIN I. KIMMELMAN, Attorney General of New Jersey.,

Respondents.

ORDER

For the reasons set forth in this court's opinion filed this date;

It is on this 27th day of February, 1986;

ORDERED that the petition for writ of habeas corpus is hereby granted; and

IT IS FURTHER ORDERED that the state has a reasonable time in which to retry petitioner and that a writ of habeas corpus shall unless within 30 days the State of New Jersey shall afford petitioner a new trial.

/s/HAROLD A. ACKERMAN
HAROLD A. ACKERMAN
U.S.D.J.

APPENDIX B

Hon. Harold A. Ackerman, U.S.D.J.

W. CARY EDWARDS
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR RESPONDENTS
BY: RAYMOND S. GURAK
DEPUTY ATTORNEY GENERAL
DIVISION OF CRIMINAL JUSTICE
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P.O. BOX CN086
TRENTON, NEW JERSEY 08625
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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL NO. 85-2008

DANA BRAUNSKILL,
Petitioner-Appellee,

v.

GARY HILTON, Superintendent, New Jersey State Prison, Trenton, New Jersey and W. CARY EDWARDS, Attorney General of New Jersey,
Movant-Appellants.

STATE OF NEW JERSEY:
SS
COUNTY OF MERCER:

CIVIL ACTION

NOTICE OF APPEAL

Notice is hereby given that W. Carey Edwards, Attorney General of the State of New Jersey, et al., respondents

above, hereby appeal to the United States Court of Appeals for the Third Circuit from the Order that a Writ of Habeas Corpus shall issue in this action 30 days from such Order which was entered on the 27th day of February, 1986.

Respectfully submitted,

W. CARY EDWARDS
Attorney General of New Jersey
Attorney for Movant-Appellant

BY: /s/RAYMOND S. GURAK
RAYMOND S. GURAK
Deputy Attorney General

DATED: March 20, 1986

APPENDIX C

Hon. Harold A. Ackerman, U.S.D.J.

W. CARY EDWARDS
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR RESPONDENTS
BY: RAYMOND S. GURAK
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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL NO. 85-2008

DANA BRAUNSKILL,

Petitioner-Appellee,

v.

GARY HILTON, Superintendent, New Jersey State Prison, Trenton, New Jersey and W. CARY EDWARDS, Attorney General of New Jersey,

Movant-Appellants.

PLEASE TAKE NOTICE that the undersigned will move, on short notice, before the Honorable Harold A. Ackerman, U.S.D.J., in the United States Courthouse Newark, New Jersey, on the 26th day of March, 1986 at 3:30 p.m. or as soon thereafter as counsel can be heard, for an Order: staying entry of the Order of February 27, 1986 that a Writ of Habeas Corpus shall issue 30 days from that date, pending determination of this matter by the United States Court of Appeals for the Third Circuit. Reliance will be placed on the accompanying affidavit in support of this motion.

Respectfully submitted,

W. CARY EDWARDS
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR MOVANT-APPELLANT

BY: /s/ RAYMOND S. GURAK
RAYMOND S. GURAK
Deputy Attorney General

DATED: March 21, 1986

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil No. 85-2008
TRANSCRIPT OF PROCEEDINGS

DANA BRAUNSKILL,

Plaintiff,

vs.

GARY HILTON, Warden of the State of New Jersey,

Defendant.

Newark, New Jersey
March 26, 1986

BEFORE:

THE HONORABLE HAROLD A. ACKERMAN, U.S.D.J.

Appearances:

JOHN F. MC MAHON, Federal Public Defender,
BY: JACQUELINE TURNER,
Assistant Federal Public Defender,
For the Plaintiff.

W. CARY EDWARDS, Attorney General of New Jersey
BY: RAYMOND S. GURAK,
Deputy Attorney General of New Jersey
For the Defendant.

THE COURT: May I have the appearances, please?

MR. GURAK: Raymond S. Gurak, Deputy Attorney General for New Jersey.

MS. TURNER: Jacqueline Turner, Assistant Federal Public Defender, for defendant David Rothstein.

THE COURT: Mr. Gurak, you're here today for what?

MR. GURAK: To seek a motion for a stay of your order for enlargement of petitioner Dana Braunskill.

THE COURT: On what ground?

MR GURAK: That's the question, your Honor.

THE COURT: That's the question I'm asking.

MR. GURAK: And the answer is for the special phases of likelihood of success on the merits.

THE COURT: That's not a reason.

MR. GURAK: It's not a reason. It is not a cognizable reason under Carter.

THE COURT: No. Under Carter the only reason is the possibly of flight.

MR. GURAK: The possibility of flight would be substantiated in this case also, your Honor.

THE COURT: Well, substantiate it.

MR. GURAK: Because this petitioner has a long prior record. And we feel that it is quite likely that he would ???? the jurisdiction given his less than though prior record and he would be cognizant of the fact that if our appeal was successful he would be compelled to serve the remainder of his term as well.

Your Honor looks perplexed.

THE COURT: I'm asking for some substantiation of that. Certainly there was nothing in your papers to even remotely indicate that.

MR. GURAK: Well, my papers, your Honor, cited the cases that dealt with the four factors that could possibly

be used to substantiate special reasons for staying an enlargement order.

THE COURT: Have you read the Court of Appeals recent decision in the Carter case?

MR. GURAK: Yes, I have. It is our office's position that notwithstanding that opinion—

THE COURT: Notwithstanding that opinion?

MR. GURAK: Yes.

THE COURT: What do you mean, "notwithstanding"? You mean I should ignore that opinion?

MR. GURAK: No, no. We feel that that opinion dealt with a specific factual instance wherein the State attempted to argue that stay would be granted in that case on the ground of dangerousness. And we feel that the Court in that decision did not preclude other factors from substantiating the special reason sufficient to grant the stay.

THE COURT: Show me where in that opinion that can be found.

MR. GURAK: I will attempt to do so. I have a Xerox copy. And I don't have page numbers on it, but under Subsection (b) of the opinion, on the right-hand side of the page just above Roman Numeral 2, there is one full paragraph. And it says, quote, It is rather that we must interpret Rule 23(d) to be consistent with federalism and comity concerned and these concerns dictate that at least in this case. The special reason presented; i.e., dangerness, is one that is particularly within the authority of the State to recognize and act upon.

THE COURT: May I read what Judge Garth said to us, which I think is more pertinent on behalf of the Third Circuit.

"Our holding that a federal court in viewing the release of a State habeas primmer who has prevailed on his con-

stitutional claim should consider only those factors which bear on guaranteeing the future presence of the petitioner does not leave the statement without recourse."

Now, the State in that case, as I read it, was told by the Court of Appeals that if it considered, as it did, Mr. Carter to be dangerous, it could go to the state courts.

I, of course, am empowered to enlarge the time if I find that there is some doubt as to Mr. Braunskill's future presence. The only point I wanted to make to you at this time is in your papers there was no indication whatsoever as to that ground. Is that correct?

MR. GURAK: As to the ground of dangerousness?

THE COURT: As to the ground that he might not be around if there was a reversal by the Third Circuit.

MR. GURAK: Right. That's true. There was no factual argument in our papers. We solely cited the case law dealing with the four factors and you have that.

THE COURT: How many more years does he have to go or have to serve, to be more precise?

MR. GURAK: He has approximately about four years to go. But he is scheduled for a parole date hearing in August.

THE COURT: In August?

MR. GURAK: In August, yes.

THE COURT: Now, you say that you feel that the fact that he has this time to serve and he has a lengthy criminal record—would you enlarge upon that theme? Tell me about his record.

MR. GURAK: I would have to refer to my papers.

THE COURT: You go right ahead, sir.

MR. GURAK: I will review this briefly; his adult history.

THE COURT: Go right ahead, sir.

MR. GURAK: In 1979 received a DP for invading privacy as a peeping Tom.

THE COURT: "DP" is disorderly persons?

MR. GURAK: That's correct.

THE COURT: As a peeping Tom?

MR. GURAK: Peeping Tom.

THE COURT: What was the sentence imposed by the Court and what was that Court, if I may?

MR. GURAK: That was a 90-day sentence to the Essex County Jail. Well, that's his prior adult record.

THE COURT: You consider that a lengthy criminal record?

MR. GURAK: Well, he has a lengthy juvenile record as well. And juvenile records can be considered to some extent in deciding whether or not a particular defendant may or may not flee a jurisdiction.

THE COURT: How old is this gentleman?

MS. TURNER: I'm not sure. I believe he's around 30. Late 20s, early 30s.

THE COURT: May I assume whatever record he amassed—I'll question you about it in a moment—was approximately at least 16 years ago? Would that be a fair assumption on this Court's part?

MR. GURAK: That would be, your Honor.

THE COURT: You want to tell me about his juvenile record now that we have carefully examined his adult record and found a 90-day sentence for being a peeping Tom, which is hardly a lengthy criminal regard by any reasonable standard.

MR. GURAK: I will admit to that, your Honor.

In 1976 he was charged with robbery.

THE COURT: He was charged with robbery?

MR. GURAK: Charged with robbery. There was a remand to Overbrook Hospital for examination.

THE COURT: To what?

MR. GURAK: Overbrook Hospital.

THE COURT: That's a psychiatric hospital?

MR. GURAK: Yes, it is.

THE COURT: What happened to that case?

MR. GURAK: As I look at it now, that was dismissed as well.

THE COURT: What else?

MR. GURAK: I'm still hunting, your Honor.

The others just—there was two with fines and others were dismissed as well.

THE COURT: Mr. Gurak, what lengthy criminal record does this man have?

MR. GURAK: I would have to say I was in error by making that statement, your Honor. I did look at that prementence report rather quickly without—and I apologize to the Court for that.

At this point in time I feel that the only thing the State would be able to argue would be that the facts of this particular case substantiate that this particular petitioner has at this time committed a very serious crime. On that basis, his dangerousness is established and we feel he has made a substantial move from his minor prior record to that of a serious offender in the state of New Jersey. And on that basis we feel that there is a reasonable likelihood

that he would not show up for the case he would have to in the future proceeding.

THE COURT: What is your name?

MS. TURNER: Jacqueline Turner, your Honor.

THE COURT: Good morning.

MS. TURNER: Basically, your Honor, what we have here is a defendant who has been held on an unconstitutional conviction for the last five years.

There's a—the question is: Did Mr. Braunskill attack this woman? That has always been the question central you. And your Honor ruled the conviction of what he was doing that is affirmed.

As Mr. Gurak admits, there's really no prior record. DP quite a while ago. Ninety days in jail. Mr. Braunskill was admitted on bail pretrial. He should showed up for his trial.

The allegation he would flee after having a few months left to spend in jail at worst has not been substantiated by the State. I remind the Court it's a heavy burden on the State to stop you from enlarging Mr. Braunskill. I maintain they have not met, your Honor. Your opinion was thorough. It was based on ample precedent. It was a narrow issue. Was very likely to be upheld in the Third Circuit on appeal.

There is no clear evidence of future dangerousness and/or likelihood of flight. He appeared during pretrial and during the trial at all times. Given the fact the burden is a heavy one on the State, I would ask your Honor that the stay be denied.

THE COURT: I'm going to deny the stay. I have not been furnished with any reasons whatsoever as to why this Court should enlarge its order related to Mr. Braunskill.

The State this morning, in response to the Court's questions, cited a lengthy criminal record. As the record clearly reflects, I questioned the Deputy Attorney General concerning this matter and that assertion was just erronous as the Deputy Attorney General now admits.

The Deputy Attorney General further argues that Mr. Braunskill is dangerous. For reasons which were amply set forth by the Court of Appeals very recently in the matter of Carter and Artis versus Rafferty, this is a matter that the State can bring to the attention of the state courts if it cares to. And I need not dwell on that theme, since Judge Garth, speaking for the Court of Appeals, did so.

Originally, as the Court noted, under the prior rule release was mandatory. Now, there are—the rule has been amended and I find no special reason here citing to the rule which would reasonably allow me to conclude that Mr. Braunskill is not going to show up in case my decision is overturned. Therefore, the relief sought today by the State is denied.

Yes, Mr. Gurak.

MR. GURAK: Your Honor, if I may respectfully ask, with regard to the first part of my presentation, about the interpretation of Carter as to what would constitute a special reason, respondent still submits, your Honor, that likelihood of success on the merits would be cognizable as a special reason. And on that basis, your Honor, I would respectfully request a conditional stay be granted so that we may file our papers by four o'clock tomorrow afternoon in the Third Circuit on this matter.

THE COURT: Wait a second. Today is the 26th of March.

Now, my order, which was issued on the 27th day of February, stated: "Ordered that petition for writ of habeas corpus is hereby granted and further ordered that the

State has a reasonable time in which to retry petitioner that a writ of habeas corpus shall issue unless within 30 days the state of New Jersey shall afford petitioner a new trial."

I'm denying you the relief you seek today for a stay. If you want to go to the Court of Appeals to seek further relief in that regard, that's the State's prerogative.

MR. GURAK: Thank you, your Honor.

THE COURT: You're quite welcome. Good morning.

MR. TURNER: Thank you, your Honor.

APPENDIX E

Hon. Harold A. Ackerman, U.S.D.J.

W. CARY EDWARDS
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR PLAINTIFF-RESPONDENT
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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL NO. 85-2008

DANA BRAUNSKILL,
Petitioner-Appellee,

v.

GARY HILTON, Superintendent, New Jersey State Prison, Trenton, New Jersey and W. CARY EDWARDS, Attorney General of New Jersey
Movant-Appellants.

FILED
MAR 26, 1986

CRIMINAL ACTION

ORDER

It is on this 26th day of March, 1986 that movant-appellants' motion for a stay of the Order that a Writ of

Habeas Corpus shall issue, 30 days from February 27, 1986, is denied.

/s/ HAROLD A. ACKERMAN
HAROLD A. ACKERMAN
Hon. Harold A. Ackerman, U.S.D.J.

APPENDIX F

W. CARY EDWARDS
ATTORNEY GENERAL OF NEW JERSEY
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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CIVIL NO. 86-5204

DANA BRAUNSKILL,
Petitioner-Appellee,

v.

GARY HILTON, Superintendent, New Jersey State Prison, Trenton, New Jersey and W. CARY EDWARDS, Attorney General of New Jersey,
Movant-Appellants.

CIVIL ACTION
MOTION IN BANC
(for a stay of order)

PLEASE TAKE NOTICE that the undersigned, will move *en banc* on an expedited basis, before the United States Court of Appeals for the Third Circuit for an Order: staying entry of the order of February 27, 1986, that a Writ of Habeas Corpus releasing petitioner shall issue 30

days from that date, pending determination of the direct appeal of this matter by this Court. This motion is not moot since petitioner is otherwise incarcerated for another conviction until May 20, 1986. Reliance will be placed on the accompanying brief and appendix in support of this motion *en banc*.

Respectfully submitted,

W. CARY EDWARDS
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR MOVANT-APPELLANTS

BY: /s/ RAYMOND S. GURAK
RAYMOND S. GURAK
Deputy Attorney General

DATED: May 16, 1986

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 86-5204

May 16, 1986

DANA BRAUNSKILL
vs.

GARY HILTON, WARDEN AND STATE OF NEW JERSEY
W. CARY EDWARDS, Attorney General of the State of New Jersey, *et al.*,

Appellants

(N.J. D.C. Civil 85-2008)

Present: ALDISERT, *Chief Judge,* SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON and MANSMANN, *Circuit Judges.*

1. Appellants' motion in banc for a stay of the District Court's order dated February 27, 1986, pending appeal *and* Brief and Appendix in support of motion, *and* letter dated May 16, 1986, in which it states that appellee is scheduled to be released on parole from state custody on another conviction on the morning of May 20, 1986,

in the above-entitled case(s).

Respectfully,

Deputy Clerk 7-1092

enc.
dt
P.S. Appellants' brief and appendix are due June 21, 1986.
The foregoing Motion is DENIED.

By the Court,

/s/ ALDISERT
ALDISERT
JA 493 Chief Judge

Dated: May 27, 1986
ad/cc: Raymond S. Gurak, Esq.
Jacqueline E. Turner, Esq.